Supreme Court, U.S.
FILED

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No.

IN THE
Supreme Court of the United States

GABRIELE OMLIN,

Petitioner,

v.

KAUFMAN & CUMBERLAND L.P.A.,

Respondent.

On Petition for Writ of Certiorari to the Unites States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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6300

QUESTIONS PRESENTED

1. Whether a state statute of limitations for legal malpractice should be tolled until the underlying adverse decision is affirmed on appeal and an injury in fact and the standing to sue is established?

2. Whether federal courts should adopt an intermediate state court decision and grant a law firm, incorporated as legal professional association, immunity from being sued for breach of written contract, breach of fiduciary duty, fraud, negligence, and infliction of emotional distress?

3. Whether a properly amended complaint and court certified copies of state courts' proceedings and an opposing affidavit supported by copies of the business record are material of the type specified under Fed. R. Civ. P. 56(c) to be considered in determining whether to grant judgment as a matter of law?

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment below.

OPINIONS BELOW

The order of the Court of Appeals for the Sixth Circuit which is not reported, appears as Appendix A to this petition.

The memorandum and order of the District Court granting Respondent's motion for summary and denying Petitioner's cross-motion for summary judgment as a matter of law, which is not reported, appears as Appendix B to this petition.

The order of the Court of Appeals denying Petitioner's motion for rehearing and rehearing en banc, which is not re-ported, appears as Appendix C to this petition.

JURISDICTION

The decision of the Court of Appeals was entered on May 1, 2001. A timely petition for rehearing and a suggestion for rehearing en banc were denied on June 29, 2001. Jurisdiction of this Court exists under 28 U.S.C. 1254(1). The District Court had jurisdiction under 28 U.S.C. 1332(a)(2). The Court of Appeals had jurisdiction under 28 U.S.C. 1332(a)(2).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 10, Clause 1, of the United States Constitution providing in pertinent part:

> "No State shall .... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts..."

The "injury-in fact" and "ripeness" doctrine as standing requisite contained in Article III, Section 2, of the United States Constitution.

Article IV, Section 1, of the United States Constitution providing in pertinent part:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The Seventh Amendment to the United States Constitution, providing in pertinent part:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

The Fourteenth Amendment to the United States Constitution, providing in pertinent part:

> "[N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 1738. State and Territorial statutes and judicial proceedings; full faith and credit, § 2 and § 3:

> "The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

Fed. R. Civ. P. 56(c) Motion and Proceedings Thereon.

> ***The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interroga-tories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. ***"

STATEMENT OF THE CASE

History of the Case

Petitioner, Gabriele Omlin, a Swiss citizen residing in Switzerland, brought this suit against Respondent, Kaufman & Cumberland Co. L.P.A., a legal professional association incorporated in Cleveland, Ohio.

Petitioner was on an extended business visit in the United States from October 19, 1994 through April 12, 1996 as temporary alien under 8 U.S.C. §1101. During her stay she rented a home in Willoughby Hills, Lake County, Ohio. Shortly before she returned home, the landlord sued her alleging that he was denied inspections of the home. Before Petitioner returned home the matter was settled by agreement and the counterclaim withdrawn. In May 1996 Petitioner received a notice from the court that a trial was set for May 23, 1996 on damages and attorney fees. As the U.S. immigration law did not a allow a re-entering before October 1996, she informed the court that she could not attend the trial and that she could not find a new attorney. Instead she sent an affidavit denying to have caused any damages. On July 26, 1996 she received an adverse judgment entered on June 27, 1996; on July 27, 1996 Petitioner sent by fax a notice of appeal.

Petitioner's retaining Kaufman & Cumberland Co., L.P.A. was based on the express representation made by Mr. Frank J. Cumberland on August 2, 1996 on the occasion of a telephone conversation with Petitioner, and confirmed in the agreement signed by the parties on September 12, 1996, that it would be Mr. Cumberland who would provide the offered legal services in a timely and competent manner at a rate of $195 per hour, occasionally assisted by others. Petitioner had asked Frank J. Cumberland to look into the landlord matter

and to discover the brand of the industrial glue the landlord had used in the home during her stay and which caused a severe rash from which Petitioner suffered for about six months and which left her with permanent skin damages.

Contrary to the agreement Respondent did not provide the services of Mr. Cumberland, but subordinated the matter to students, associates and paralegals, who were inexperienced in the applicable laws and rules of procedure. In addition, those associates left the firm during their work and were frequently replaced by others so that nobody was really informed on the facts and the work of his predecessor.

Withholding the promised professional experience resulted in the dismissal of an appeal, in the dismissal of an untimely filed Rule 60(B) motion, and in the dismissal of the subsequent appeal.

One of the young attorneys recommended and filed a tort action in the Cuyahoga County court of common pleas seeking compensation for bodily injury caused by the industrial glue. When he left the firm, his successor declined a settlement offer from the opposing counsel without asking Petitioner. When the court threatened several times to dismiss the case for want of prosecution, the associate recommended to voluntarily dismiss the case, because he had failed for almost a year to discover from the plumber the brand of the glue used needed for the medical tests.

Proceedings below

On January 8, 1999 Petitioner filed her complaint in the U.S. District Court and attached a copy of the agreement. (Appendix D; Complaint. Appendix E; Contract. R.1[1];

[1] Record in the District Court

Complaint). The complaint asserted misrepresented competence, breach of contract, breach of fiduciary duty, negligence, misleading legal advise misleading status reports, unjustified enrichment, causing Petitioner monetary loss, mental anguish, pain and suffering.

It was Petitioner's full intention not to sue an individual attorney for malpractice. *First*, the reason for the unsuccessful legal work was the consequence of the breach of contract. *Second,* the young attorneys and other Respondent's staff were not employed by Petitioner, but assigned by Respondent. *Third,* Petitioner is not going to sue a young attorney and destroyhis or her career just because they were not experienced enough to do the work. *Fourth*, Respondent profited on every hour of its associates. *Fifth,* it is normal business standard that employers are liable for the work of their employees (master/slave doctrine).

On March 9, 1999, the Respondent answered the complaint (R. 4; Answer to Complaint). No counterclaim was filed. On July 1, 1999, following the production of documents by the Respondent and in compliance with the case management plan, the Petitioner filed an amended complaint (R. 15; Amended Complaint) answered by the Respondent on July 30, 1999 (R. 17; Answer to Amended Complaint).

On September 15, 1999, Petitioner filed a Motion for Sanctions pursuant to Fed. R. Civ. P. 11 (R.22; Motion for Sanctions). On September 29, 1999, the Respondent opposed the motion for sanctions (R. 24; Brief by Defendant). On October 18, 1999, the district court denied Petitioner's motion for sanctions "because it does not satisfy Rule 11 and is better made as an argument for Summary Judgment" (R. 28; Order).

On February 1, 2000, the Respondent filed a Motion for Summary Judgment (R. 37; Motion by Defendant for

Summary Judgment). On February 15, 2000, Petitioner filed an opposition to defendants motion for summary judgment (R. 39; Opposing Brief. R. 40; Affidavit). On February 22, 2000, the Respondent filed its reply (R. 41; Reply by Defendant).

On February 22, 2000, Petitioner filed her cross-motion for summary judgment (R. 42; Motion by Plaintiff for Summary Judgment with R. 43; R. 44; R. 45). On March 7, 2000, the Respondent filed an opposition (R. 46; Brief by Defendant). On March 14, 2000, Petitioner filed a reply (R. 47; Reply by Plaintiff. R. 48; Plaintiff's Exhibits).

On July 6, 2000, the district court granted without oral hearing the Respondent's Motion for Summary Judgment (R. 52; Memorandum & Order) and denied by a separate Order of the same date Petitioner's Motion for Summary Judgment and dismissed the case. On August 3, 2000 Petitioner filed a timely Notice of Appeal.

In her appeal brief Petitioner separately set out the following issues for review:

> "1. Whether the district court applied as a matter of law an improper standard when it granted summary judgment to Appellee by relieving Appellee from its initial burden to demonstrate that there is no genuine issue of fact to be tried.
>
> 2. Whether the district court erred as a matter of law in granting summary judgment to Appellee by failing to receive Appellant's amended complaint and basing its summary judgment on Appellant's original complaint.

3. Whether the district court erred as a matter of law in granting summary judgment to Appellee by concluding that Appellant's complaint is not a breach-of-express contract claim, breach of fiduciary duty claim, and a tort claim.

4. Whether the district court erred as a matter of law in denying the nonmoving Appellant the appropriate inferences and presumptions of the truth of her allegations.

5. Whether the district court erred as a matter of law in granting Appellee's motion for summary judgment, without finding that there is no genuine issue of fact.

6. Whether the district court erred as a matter of law and fact in granting summary judgment to Appellee by concluding that Appellant's action is time-barred.

7. Whether the district court erred as a constitutional matter in denying Plaintiff's motion for summary judgment, by discounting the state judgments". (Appellant's Brief page 9)

In her reply brief, Petitioner identified the following genuine issues of fact and law:

"1. Determination of the nature of the case on the analysis of the gist of Appellant's Original Complaint instead of Appellant's Amended Complaint.

2. Exclusive reliance on Cumberland's affidavit and on the law firm's argument that the termination of

the attorney-client relationship accrued on January 6, 1998, although contradicted by Appellant's affidavit supported by convincing evidence.

3. The accrual of the statute of limitations has to be explored and determined for each particular transaction, i.e. for the Cuyahoga County transaction and for the municipal court transaction.

4. The law firm's January 8, 1998 letter to Appellant and the law firm's invoice for the month of January 1998 demonstrate that: (a) Cumberland refused to withdraw as counsel and asked for further employment on both the Lake County and the Cuyahoga County case; (b) that on January 8, 1998 Cumberland gave Appellant still legal advice; (c) that the law firm's employee Webster resumed Appellant's outside representation as long as January 13, 1998 discussing discovery matters with the opposing counsel; The law firm charged Appellant for the letter of January 8, 1998 and for the all other time through January 14, 1998.

5. Appellant was not and could not be aware on January 5, 1998 that Cumberland's advice given on January 8, 1998 in the Cuyahoga County transaction on which Appellant relied was false. Appellant could discover the loss and injury only in December 1998, when she tried to refile the case.

6. The Lake County action was only filed on January 2, 1998. before December 14, 1998, Appellant could not be aware of the seriousness of her legal problems and of the serious loss and injury caused to her.

> 7. The law firm has sought summary judgment only on its own two issues and on none of the counts contained in Appellant's Amended Complaint; all 21 counts are genuine issues of fact and law on which Appellant has sought summary judgment with her cross-motion for summary judgment." (Appellant's Reply Brief pg. 7-9)

The order of the Court of Appeals shows that the court only reviewed issue 5 and none of the other assignments.

The footnotes in the District Court's memorandum (Appendix B), especially footnote 4 and 5 do not reflect the facts, but mirror the Respondent's motion for summary judgment.

In footnote 4 the District Court acknowledged that the latter argument is premised, in part, on the fact that Petitioner's own expert failed to find Respondent breached any duty it owed her as counsel.

In her opposing brief, Petitioner objected to the use of the affidavit of Respondent's expert as hearsay evidence, because this expert report was based on Petitioner's expert report and not on Respondent's expert own knowledge. With court certified copies of the underlying litigation Petitioner brought proof that several statements made by Respondent's expert under oath, were untrue. Respondent also took over Petitioner's expert and attached his report as evidence to Respondent's brief. Respondent could neither get from Petitioner's expert a sworn affidavit nor an unsworn statement subscribing the report as being true under penalty of perjury (28 U.S.C. § 1746). As this expert report did not comply with the requirements of § 1746, the facts averred to therein lacked the force and effect of an affidavit for purposes of moving for summary judgment. *See e.g. Zainalian v. Memphis Board of Education,* 2001 U. S. App.

LEXIS 2269; *Lavado v. Keohane,* 992 F.2d 601, 605 (6th Cir. 1993). To overcome this obstacle, Respondent played in its brief a question and answer game, with questions Petitioner's expert was never asked and with answers he had never given. In her opposing brief Petitioner objected this procedure and the evidence, and raised this issue on appeal. (Appeal Brief pg. 14)

The "treatment" by the landlord mentioned in footnote 5 is not the subject of this case, was never the subject of any case and the allegations are not supported by any evidence.

REASONS FOR GRANTING THE PETITION

1. The decision entered by the Court of Appeals for the Sixth Circuit is in conflict with the decisions of several other U.S. Courts of Appeals and with decisions of several state courts of last resort which held that the statute of limitations for legal malpractice actions is tolled until the underlying judicial process is finalized.

Granting the petition is especially justified by the conflicts among the circuits and the states, and the frequency with which these cases arise. Not tolling the limitations statute until the appeal is final encourages attorneys in states with only a one-year limitations period to hide mistakes from clients and file even meritless appeals, because attorneys have a good chance that injured clients have lost their right to remedy before the reviewing court announces its adverse decision.

In *Pioneer Inv. Servs. v. Brunswick Assocs.* (91-1695), 507 U.S. 380 (1993) this Court approved that clients can be held accountable for the acts and omissions of their attorneys, but it is silent on as whether this decision influences the application of state limitation periods.

The dissenting opinions mirror the difficulties judges in the U.S. Courts of Appeals and justices in the state courts of last resort across the country are facing when trying to reconcile the Equal Protection and Due Process clause under the Fourteenth and Second Amendments to the United States Constitution.

To cope with the situation, state courts, followed by the federal courts, have developed a whole array of different rules governing the application of limitations statutes with

regard to cases based on underlying litigation. Texas, Tennessee and Arkansas apply the "exhaustion of appeals rule", Illinois and Maryland apply the "[trial court] judgment rule", Virginia opted for the "payment rule"[of judgment].

Other states apply the "[injury] discovery rule" (Ohio, not all courts) or the "damage rule" (Alaska) no matter if there was underlying litigation or not.

In *Pope County v. Friday, Eldredge & Clark*, 313, Ark. 83, 852 S.W.2d 114 (1993) the Arkansas Supreme Court (applying the "exhaustion of appeals rule") held:

> "[A] putative plaintiff has no legal malpractice claim until an underlying adverse decision is affirmed on appeal because his or her damages are speculative until that point." *Id.* 115 (summarizing the court's prior holding in *Stroud v. Ryan*, 297 Ark. 472, 763 S.W.2d 76 (Ark. 1989).

Using also the "exhaustion of appeals rule" in *Huges v. Mahaney & Higgins*, 821 S.W.2d 154, (1992) the Supreme Court of Texas held:

> "[W]here 'a person is prevented from exercising his legal remedy by pendency of legal proceedings, the time during which he is thus prevented should not be counted against him in determining whether limitations have barred his rights (citations omitted). *Id* at 157. *** A cause of action for legal malpractice accrues when the client sustains a legal injury or, in cases governed by the discovery rule, when the client discovers or should have discovered the facts establishing the elements of a cause of action (citations omitted) *** We conclude that the rationale applied in these

> cases is also appropriate when a client's cause of action for malpractice arises during the attorney's prosecution or defense of a claim which results in litigation. Limitations are tolled for the second cause of action because the viability of the second cause of action depends on the outcome of the first. Therefore, we hold that when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on the malpractice claim against the attorney is tolled until all appeals on the underlying claim are exhausted. We join other jurisdictions in adopting this well-reasoned rule." (footnote and citations omitted). *Id.*

In *Parker Streber v. Hunter*, 221 F.3d 701 (2000) the U.S. Court of Appeals for the Fifth Circuit observed that "[I]n Texas, attorney malpractice claims are among the two types of claims that, because they are considered 'inherently undiscoverable' implicate an unlimited discovery rule" (citation omitted). *Id.*

Recently the undivided Supreme Court of Texas in *Apex Towing Company v. Tolin*, __ S.w.3d __ (Tex. 2001) reaffirmed the tolling rule announced in *Hughes*.

Under Arizona law, a legal malpractice claim that arises in the course of litigation accrues when two elements are met. First, the plaintiff must know or should reasonably have known of the legal malpractice. *Amfac Distrib. Corp. v. Miller*, 673 P.2d 795, 796 (Ariz.Ct.App.1983) ("*Amfac I*"). Second, the plaintiff's damages must be "certain and not contingent upon the outcome of an appeal." In *Taylor v. State Farm Mut. Auto. Ins. Co.*, 913 P.2d 1092, 1096-97 (Ariz.1996) the Supreme Court of Arizona restated:

> "[B]ecause the plaintiff's injury is uncertain until the appellate process concludes, by resolution of or failure to appeal, the malpractice action does not accrue until such time as the judgment in the underlying action becomes final."; *Amfac Distrib. Corp. v. Miller*, 673 P.2d 792 (Ariz.1983) *("Amfac II")* (approving the rule set forth in *Amfac I*); *Commercial Union Ins. Co. v. Lewis and Roca,* 902 P.2d 1354, 1359 (Ariz.Ct.App.1995) ("[I]n the context of litigation, attorney negligence is not actionable until the case in which the malpractice arose is finally resolved."). A case is no longer contingent upon the outcome of an appeal when the time for filing such appeal has passed or when the appellate court issues a mandate. See *Joel Erik Thompson Ltd. v. Holder*, 965 P.2d 82, 85 (Ariz. Ct.App.1995) (clarifying that a judgment becomes final when the appellate court decides the appeal and when the time to appeal to the state supreme court has expired)."

In *Porter v. Ogden*, 241 F.3d 1334, the U.S. Court of Appeals for the Eleventh Circuit examining a judgment entered by the U.S. District Court for the Middle District of Florida, found:

> "[U]nder Florida law, '[g]enerally, a cause of action for negligence does not accrue until the existence of a redressable harm or injury has been established and the injured party knows or should know of either the injury or the negligent act.' *Peat, Marwick, Mitchell & Co. v. Lane,* 565 So.2d 1323, 1325 (Fla.1990). When a plaintiff bases a malpractice action on errors committed in the course of litigation, and the litigation proceeds to judgment, the redressable harm is not established

until final judgment is rendered." *Id.* at 1339. *See Silvestrone v. Edell,* 721 So.2d 1173, 1175 (Fla.1998).

In *Kaplan v. Shure Brothers, Inc,* 153 F.3d 413 (1998) the U.S. Court of Appeals for the Seventh Circuit (interpreting Illinois law and the "[trial court] judgment rule") found:

> "[T]that Kaplan's malpractice against his former attorney Weinberg accrued when Kaplan 'knew or should have known, that the injury to him *** was wrongly caused by Weinberg *** when [the district] Court ruled [on the parallel claim against Shure] on July 17, 1996 and September 13, 1996.' *Id.* at 421 (what, however had no impact on the Circuit Court's decision, because the case was time-barred by the applicable statute of repose.)"

In *Fullerton v. Fahrenkopf Jr.*, 215 F.3d 1340 (1999) the U.S. Court of Appeals for the Federal Circuit held:

> "[I]n view of the January 8, 1992 written agreement, the applicable statute of limitations for any acts of malfeasance during these periods is five years (i.e., the statute of limitations for written contracts), and the filing of the complaint on November 7, 1996 is timely as to such acts, which appear to have been alleged." *Id* at 1342.

In *Allied Productions Virgina, Inc. v. Duesterdick*, 217 Va. 763, 232 S.E.2d 774 (1977). The Supreme Court of Virginia, over a vigorous dissent, applied the "payment rule":

> "[W]hen a client suffered a judgment for money damages as the proximate result of his lawyer's

> negligence such judgment constitutes actual damages recoverable in a suit for legal malpractice only to the extent such judgment has been paid" *Id.* at 766.

In his dissenting opinion Justice Proff criticized that the "payment rule" may result in: (a) immunity for the lawyer when the injured client cannot pay a huge adverse judgment in the underlying suit; (b) in flood of suits when the injured plaintiff makes partial payments and sues his lawyer after each partial payment; (c) in due process problems when the injured client's, after having paid the judgment and obtained the right to sue, is dismissed as coming too late.

In *Beesley v. Van Doren* (1994), 873 P.2d 1280, Alaska's Supreme Court Justice Rabinowitz in his dissenting opinion wrote:

> "[I] dissent from the majority's holding that the applicable statute of limitations "is not tolled until all appeals have been exhausted. *** [O]ur jurisprudence has de-emphasized the traditional policies advanced in support of statutes of limitations, namely, fairness to the defendant (notice). *** [W]e held in Shaw that in a legal malpractice action arising out of a criminal proceeding the statute of limitations for filing legal malpractice claims must be tolled until the criminal defendant obtains post-conviction relief. 816 P.2d at 1360. *** [T]o force malpractice plaintiffs to file their actions before they know the outcome of the case upon which their claim is based does not promote judicial economy. The status of the malpractice claim is uncertain until the appeal in the underlying case is resolved, because if it is ultimately decided in the client's

favor the malpractice suit may well become moot for lack of damages". *Id.* at 1286.

In *Zimmie v. Calfee, Halter and Griswold* (1989) 43, Ohio St.3d 54, 538 N.E.2d 398, the divided Ohio Supreme Court held:

> "[U]nder R.C.2305.11(A), a cause of action for legal malpractice accrues, and the one-year statute of limitations commences to run, when (1) there is a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney, or (2) the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later." (citations omitted).

In his dissenting opinion Justice Sweeney wrote:

> "[I] believe that fairness, as well as a certain sense that the judicial system will arrive at the correct and just result, compels a finding that a legal malpractice action should not accrue until the appellate process has run its course *** The majority opinion herein does not enlarge access to the courts in the manner that the aforementioned cases do; it merely encourages a clogging of court dockets with actions that may very well be baseless." *Id.* at 403, 404.

In his dissenting opinion Justice Herbert R. Brown wrote:

> "[T]wo requirements must be met to apply the statute of limitations as a time bar to a malpractice action. First, the requisite time must have elapsed following the injury to the plaintiff. Second, the requisite time must have elapsed following a cognizable event leading to the discovery of that injury." *Id.* at 405.

In his separate concurring opinion in *Allen v. D. Murph* 194 F.3d 722 Circuit Judge Krupanski of the U.S. Court of Appeals for the Sixth Circuit (interpreting the "[actual] injury rule in *Zimmie* as "judgment rule") advised the Murphs (who, in this suit unsuccessfully tried to recover attorney fees from a case their former lawyer had won for them, but then failed to apply for attorney fees) as follows:

> "[B]cause the Murphs have, to this date, been confronted only with a *potential* financial loss which will not materialize into actual injury or loss, depending upon the final disposition of an appellate review of the magistrate's decision by this court or the United States Supreme Court, the Ohio legal malpractice limitations statute, pursuant to the dictates of the Ohio Supreme Court in *Zimmie, supra,* is tolled until an appellate review of the instant appeal has been finally concluded. *** However, should the instant appeal affirm the magistrate's ruling, the petitioners will, for the first time, suffer an actual injury or loss, as defined in *Zimmie*. *** [A]nd therefore the Murphs' time limitation within which to file their malpractice claim against their legal counsel does not begin to accrue until the petitioners have suffered actual injury in the form of financial losses which will be cognizable for the first time

> under *Zimmie* upon a final disposition of the current appellate review." *Id.* at 729

In *Harris. v. Liston* (1999), 86 Ohio St. 3d 203; 714 N.E.2d 377 the Ohio Supreme Court confirmed its previous ruling on the discovery [of injury] rule.

In *FDIC v. Alexander*, 78 F.3d 1103 (1996) the U.S. Court of Appeals for the Sixth Circuit held:

> "[I]n determining when the "cognizable event" took place under *Zimmie*, a court must explore the facts of the case and determine when the injured party became aware, or should have become aware, of the extent and seriousness of his or her alleged legal problem; whether the injured party was aware, or should have been aware, that the damage or injury alleged was related to a specific legal transaction or undertaking previously rendered him or her; and whether such damage or injury would put a reasonable person on notice of the need for further inquiry as to the cause of such damage or injury. *Omni-Food & Fashion, Inc. v. Smith,* 38 Ohio St.3d 385, 528 N.E.2d 941, 944-45 (1988). *** Under *Zimmie,* for purposes of the accrual of a legal malpractice claim, an attorney-client relationship ends "when the attorney-client relationship for that particular transaction or undertaking terminates." *Zimmie*, 538 N.E.2d at 401 (citing Omni-Food & Fashion, 528 N.E.2d at 942). *** That court also stated that "the question of when an attorney-client relationship for a particular undertaking or transaction has terminated is necessarily one of fact." *Id.* Requiring that an external event trigger a plaintiff to investigate a potential malpractice action is

> consistent with other Ohio malpractice cases. See *Zimmie v. Calfee, Halter and Griswold*, 43 Ohio St.3d 54, 538 N.E.2d 398, 402 (1989) (in legal malpractice action, cognizable event occurred when trial court invalidated plaintiff's antenuptial agreement); *Koch v. Gross,* 64 Ohio App.3d 582, 582 N.E.2d 51, 54 (1990) (holding that cognizable event occurred when the plaintiff was advised of the legal malpractice by her new attorney*); Herr v. Robinson Memorial Hosp.*, 49 Ohio St.3d 6, 550 N.E.2d 159, 162 (1990) (cognizable event occurred when new doctor informed the plaintiff that he previously had been misdiagnosed); *Tober v. Kaiser Found. Hosps.*, 79 Ohio App.3d 333, 607 N.E.2d 469, 473 (1992) (same)." *Id* at 1111

In *Woodruff v. Tomlin,* 511 F.2d 1019, 1020-21 (6th Cir.1975), mem. decision on remand, 423 F.Supp. 1284 (W.D.Tenn.1976), rev'd, 593 F.2d 33 (6th Cir.1979), aff'd in part, rev'd in part en banc, 616 F.2d 924 (6th Cir.1980), cert. denied, 449 U.S. 888, 101S.Ct. 246, 66 L.Ed.2d 114 (1980). the U.S. Court of Appeals for the Sixth Circuit (applying Tennessee law) ruled:

> "[T]hat the limitations period did not begin to run until the appellate process had concluded. The relationship of attorney and client did not end on the date of the oral argument; it certainly continued until after the Court of Appeals decided the case. Until the case was finally terminated and a final judgment rendered the plaintiffs could not prove damage, because the Court of Appeals might have granted a new trial, and on retrial a different result could possibly have occurred." 511 F.2d at 1020.

2. The U.S. Court for the Sixth Circuit has decided an important constitutional question by importing into the circuit a state court ruling disallowing clients to sue their former attorneys for breach of contract.

The District Court's finding that Petitioner

> "[s]eeks to asserts claims for breach of a [written] contract, breach of fiduciary duty, and fraud"

cannot be reconciled with the District Court's decision that.

> "[A]lthough [Omlin's] complaint alleges breach of contract, there is no question that the gist of [her] complaint is for legal malpractice subject to the one year statute of limitations in R.C. § 2305.11(A)."

This decision is not supported by any state statute but is based on the intermediate state court's ruling in *Muir v. Hadler Real Estate Mgmt. Co.*, 446 N.E.2d 820, 822 (Ohio Ct. App. 1982):

> "[A]n action against one's attorney for damages resulting from the manner in which the attorney represented the client constitutes an action for malpractice within the meaning of R.C. 2305.11, regardless of whether predicated upon contract or tort or whether for indemnification or direct damages. *** [m]alpractice by any other name still constitutes malpractice *** "[U]nprofessional misconduct may consist either of negligence or the breach of contract of employment. It makes no difference whether the professional misconduct is founded in tort or contract, it still constitutes malpractice. Accordingly, the one year malpractice

> statute of limitations set forth in R.C. 2305.11 is applicable." *Id.*at 822.

In fact, the state statute regulating the practice of law in the State of Ohio provides in Section 4705.15(A)(2) of the Revised Code:

> "Tort action" means a civil action for damages for injury, death, or loss to person or property. "Tort action" includes a product liability claim that is subject to sections 2307.71 to 2307.80 of the Revised Code, but does not include a civil action for damages for breach of contract or another agreement between persons."

The *Muir* court decision: (1) constitutes the impairing of a private contract by the State of Ohio through its judicial branch and is in conflict with the Contract Clause, providing:

> "[N]o State shall .... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts..."

and (2) creates two classes of people (the class of attorneys /law firms who cannot be sued for breach of contract but can sue their clients for breach of contract, and the class of clients who can be sued for breach of contract, but cannot sue their attorneys / law firm for breach of contract) and is in conflict with the Equal Protection Clause, providing:

> "[N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In *Johnson v. Railway Exp. Agency*, 421 U.S. 454, 95 S.Ct. 1716 the concurring/dissenting opinion referred to *Jones v. Alfred H. Meyer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968) as follows:

> ".***[w]e concluded that Congress intended to prevent private discriminatory deprivations of all the rights enumerated in § 1 of the 1866 Act, including the right to contract. 392 U.S., at 426, 88 S.Ct. at 2195. The Court's recognition of a proscription in § 1981 against private acts of employment discrimination, ante, at 1719, 1720, reaffirms that the early Civil Rights Acts reflect congressional intent to 'speak . . of all deprivations . . . whatever their source.' " (citations omitted). *Id.* at 1725.

When finding that a "breach of contract" falls into "the manner in which the attorney represented the client", the *Muir* court ignored the fact that when signing a contract with his client the attorney neither represents the client nor the client's interest, but himself and his own interests, and when the attorney signs a contract on behalf of a law firm, he represents the law firm and its interests.[2]

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[2] Ohio Revised Code § 2305.06 Except as provided in sections 126.301 [126.30.1] and 1302.98 of the Revised Code, an action upon a specialty or an agreement, contract, or promise in writing shall be brought within fifteen years after the cause thereof accrued.

§ 126.03 Director to prepare capital plan and budget; agency recommendations.

§ 1302.98 (UCC 2-725) Statute of limitations in contracts for sale: (A) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the

The *Muir* Court also ignored that a law firm can have contractual obligations, as in this case, in addition to the professional duties of an attorney. In *McCourbey v. Kellogg* (2001) 246 F3d 666, the U.S. Court of Appeals for the Fourth Circuit recognized that a legal malpractice may sound in either tort or contract depending on the context.

Westlaw© reports 38 cases in which state courts of appeals used the *Muir* rule. Attorneys and law firms (and the insurance companies they represent) have no interest to challenge a decision that grant them immunities which might

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period of limitation to not less than one year but may not extend it.

§ 2305.012. A cause of action shall be considered to accrue for all purposed as determined by the statute of limitations that applies to that cause of action.

§ 2307 Except as provided in sections 126.301 and 1302.98 of the Revised Code, an action upon contract not in writing, express or implied, or upon liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued.

§ 2305.08 If payment has been made upon any demand founded on a contract, or a written acknowledgment thereof, or a promise to pay it has been made and signed by the party to be charged, an action may be brought thereon within the time limited by sections 2305.06 and 2305.07 of the Revised Code, after such payment, acknowledgment, or promise

§ 2305.09 An action for any of the following causes hall be brought within four years after the cause thereof accrued: (A) For trespassing upon real property; (B) For the recovery of personal property, or for taking or detaining it; (C) For relief on the ground of fraud; (D) for an injury to the rights of plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305,12, 2305.14 and 1304.35 of the Revised Code.

explain that the *Muir* decision has not yet been before the Ohio Supreme Court.

3. The courts below did not consider Petitioner's properly amended complaint, the court certified copies of state courts' proceedings and her opposing affidavit supported by copies of the business record.

Fed. R. Civ. P. 56(c) provides:

> "***The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. ***"

Citing *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Circuit 1989) that

> "[T]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact",

and requiring that according to *Fulson v. City of Columbus*, 801 F. Supp. 1, 4 (S.D. Ohio 1992)

> "[T]he non-moving party is under an affirmative duty to point out specific facts in the record as it has been established which create a genuine issue of material fact."

the District Court leaves open what a non-moving party can do more to satisfy these requirements than file a timely opposing pleading, cite therein the papers presented as evidence and point to the relevant number of the supporting exhibits. (Appendix B)

> Relying on *Street* the District Court, to Petitioner's prejudice, exclusively received the facts from the brief of the moving party, no matter if they were supported by evidence or not. Specifically, the district court did not consider Respondent's letter of January 8, 1998 (Appendix F.R. 39; Opposing Affidavit, Exhibits B 34-35) giving the false legal advice and creating along with the presented invoices (both documents numbered as exhibits and referred to in Petitioners opposition to Respondent's motion for summary judgment) a genuine issue of fact when the statute of limitations began to run.

In *Omni-Food & Fashion, Inc. v. Smith* (1988), 38 Ohio St.3d 385, 528 N.E.2d 941) the Ohio Supreme Court held:

> "The question of when an attorney-client relationship for a particular undertaking or transaction has terminated is necessarily one of fact." *Id* at 944.

The *Street* and the *Fulson* rulings are in conflict with this Court's ruling in *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, (when ruling on a Rule 56 motion, "the court must review all of the evidence in the record"), and with *Lytle v. Household Mfg. Inc*, 494 U.S. 545, (drawing all "reasonable inferences in favor of the nonmoving party, but making no credibility determinations or weighing any evidence". *Id.* at 554-555.)

Street and the *Fulson* are also in conflict with this Court's ruling in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 that "(c) redivility determinations, the weighing of the evidence, and the drawing of the legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." *Id.* at 255.

The disregard of Petitioners properly amended complaint is in contradiction with decisions of this Court considering amended complaints. *See e.g.: Hospital Bld. Co. v. Rex Hospital Trustees,* 4225 U.S. 738 (1976); *Wallace v. Jaffree*, 466 U.S. 924 (1984); *Ashcroft v. Mattis*, 431 U.S. 171 (1977); *Gould, Inc. v. Adams*, 469 U.S. 1122 (1985);

Another open issue is, if under Article IV Section of the Constitution of the United States and on the Full Faith and Credit Act, 28 U.S.C. 1738, court certified copies of the state judgments are considered to be a material specified under Fed. R. Civ. P. 56(c).

In *Baker v. General Motors Corporation*, 477 U.S. 242; 106 this Court held:

> "4. The first Congress enacted the original Full Faith and Credit statute in May 1790. See Act of May 26, 1790, ch. 11, 1 Stat.122 (codified as amended at 28 U.S.C. § 1738) ("And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken."). Although the text of the statute has been revised since then, the command for full faith and credit to judgments has remained constant."

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Gabriele Omlin
15 Hirzbodenweg
Basel, CH-4052
Switzerland
Petitioner *pro se*

September 26, 2001

APPENDIX

APPENDIX A

Nos. 00-4003/4142
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION.

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. this notice is to be prominently displayed if this decision is reproduced.

Entered on
May 01, 2001

GABRIELE OMLIN
Plaintiff-Appellant
v.
KAUFMAN & CUMBERLAND COMPANY, L.P.A.,
Defendant-Appellee

ORDER

Before: BOGGS and CLAY, Circuit Judges; ROBERTS, District Judge. *

Gabriele Omlin, a pro se resident of Switzerland, appeals a district court order dismissing her civil action filed pursuant to 28 U.S.C. § 1332(a)(2) and a district court order denying her an extension of time so this court could review a non-final order. This case has been referred to a panel of the

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* The Honorable Victoria A. Roberts, United States District Judge for the Eastern District of Michigan, sitting by designation.

court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary relief, Omlin sued the law firm of Kaufman & Cumberland contending that: 1) work performed for her was below the minimum standard of care; 2) the law firm did not comply with its duty to engage in proper discovery; and 3) the firm made false representations for the purpose of inducing her to enter into a representation agreement. The district court subsequently granted summary judgment to Kaufman & Cumberland concluding that Omlin's complaint was barred by Ohio's applicable statute of limitations.

In her timely appeals, Omlin argues that the district court should not have granted summary judgment to Kaufman & Cumberland as genuine issues of material fact existed; that the district court erred in ignoring her amended complaint; that the district court should not have construed her complaint as an action for breach of contract, breach of fiduciary duty, and tort claim; and that her complaint was not barred by the applicable statute of limitations.

The court reviews the district court's orders de novo. *See Allen v. Michigan Dept. of Corr.*, 165 F.3d 405, 409 (6th Cir. 1999). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. When reviewing a motion for summary judgment, the court must view the evidence and any inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Id.*

Omlin's complaint is barred by Ohio's one-year statute of limitations. Under Ohio law, the statute of limitations for a legal malpractice action is one year. Ohio Rev. Code §

2305.11(A)(1). In *Zimmie v. Calfee, Halter & Griswold,* 43 Ohio St. 3d 54, 538 N.E.2d 398, 401 (Ohio 1989), the court stated that the statute of limitations:

> begins to run when there is a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later.

In this case, termination of the attorney-client relationship is the later event. Omlin's alleged injuries, which placed her on notice of a possible need to pursue remedies against Kaufman & Cumberland, was when she perceived "mistakes in lawyering." Omlin learned of these mistakes, at the latest, on January 5, 1998, when she sent Kaufman & Cumberland her notice demanding that the firm "correct your mistakes" or withdraw as counsel. The termination of Omlin's attorney-client relationship with the firm occurred the next day on January 6, 1998, when Omlin directed Kaufman & Cumberland to advise the courts, "that at my request you are withdrawing as counsel effective immediately."

An attorney-client relationship is not continued or extended, for the purposes of running the statute of limitations, by the amount of time it takes the attorney to withdraw as counsel. *See Wozniak v. Tonidandel,* 121 Ohio App. 3d 221, 699 N.E.2d 555, 558-59 (Ohio Ct. App. 1997). As Omlin terminated her relationship with Kaufman & Cumberland on January 6, 1998, the one-year statute of limitations on her claim began to run on this date. Thus, Omlin was required to bring any malpractice claim against Kaufman & Cumberland on or before January 6, 1999. However, Omlin did not file her

complaint until January 8, 1999. Thus, Omlin's action is time barred.

Although Omlin argues that this action was not a malpractice action, but a breach of contract, breach of fiduciary duty, and tort action, an "action against one's attorney for damages resulting from the manner in which the attorney represented the client constitutes an action for malpractice within the meaning of R.C. 2305.11, regardless of whether predicated upon contract or tort or whether for indemnification or for direct damages." *Muir v. Hadler Real Estate Mgmt. Co.*, 4 Ohio App. 3d 89, 446 N.E.2d 820, 822 (Ohio Ct. App. 1982). The *Muir* court noted that: "malpractice by any other name still constitutes malpractice . . . . [M]isconduct may consist either of negligence or of the breach of the contract of employment. It makes no difference whether the professional misconduct is found in tort or contract, it still constitutes malpractice. Accordingly, the one year malpractice statute of limitations set forth in R.C. 2305.11 is applicable." *Id.* Thus, Omlin's attempt to characterize her action as something other than a legal malpractice proceeding is without merit.

Omlin contends that the district court ignored her amended complaint and that genuine issues of fact prevent the granting of summary judgment to Kaufman & Cumberland. Despite Omlin's arguments, the undisputed facts establish that her attorney-client relationship with Kaufman & Cumberland terminated on January 6, 1998. However, she did not file her complaint until January 8, 1999. Therefore, the action is barred.

Finally, Omlin has appealed the district court's order denying her an extension of time to appeal a non-final order. An appeal from a final judgment draws into question all prior non-final rulings and orders. *Coleman v. Am. Red Cross*, 23 F.3d 1091, 1096 (6th Cir. 1994). As Omlin has appealed the district court's final judgment, the district court's prior denial of Omlin's motion to strike is properly before this court. *Id.*

Therefore, the second notice of appeal is duplicative. In addition, as Omlin's complaint is barred by the applicable statute of limitations, the motion to strike was properly denied.

Accordingly, we affirm the district court's orders. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

s/

Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Entered on
July 5, 2000

GABRIELE OMLIN
Plaintiff
v.
KAUFMAN & CUMBERLAND CO., L.P.A.
Defendant
Case No. 1:99CV00047
Judge O'Malley

Plaintiff Gabriele Omlin, a citizen of Switzerland, brings this action pro se against her former Cleveland, Ohio lawfirm, Kaufman & Cumberland Co. ("K&C"). In her complaint, Omlin alleges that: (1) then work performed by K&C "was below the minimum standard of care", complaint at §4; (2) K&C "failed to comply with [its] fiduciary duty to do the proper discovery work", id. at §5; and (3) K&C made "false and fraudulent" misrepresentations to her, "for the purpose to inducing (her) to enter into a representation agreement" id. at § 8. In her complaint, Omlin does not separately set out her claims; a fair reading of the complaint, however, suggests she

claims; a fair reading of the complaint, however, suggests she seeks to assert claims for breach of contract and fraud.[1] The Court has diversity jurisdiction over this action, pursuant to 28 U.S.C. § 1§332(a)(2).

K&C has filed a motion for summary judgment (docket no. 37), and Omlin has filed a cross-motion for summary judgment (docket no. 42). For the reasons stated below, K& C's motion is GRANTED, Omlin's motion is DENIED, and this case is DISMISSED.

The following material facts are not in dispute. Omlin's initial contact with K&C occurred on August 2, 1996, when se met with attorney Frank Cumberland. Omlin asked Cumberland to represent her in connection with a legal dispute she had with her landlord[2]. The landlord had already obtained a $ 1,000.00 judgment against her in Willoughby, Ohio Municipal Court, and shed wanted then judgment vacated or reversed (the "Willoughby Case"). Unfortunately for Omlin,, when she first met with Cumberland, the time within in which to file a timely appeal of the Willoughby Case trial court judgment had already expired. K&C explained this to Omlin, but she was insistent on pursuing an appeal anyway; she urged K&C to argue on appeal that the Hague Convention allowed her additional time. K&C decided it would represent Omlin, so on September 5, 1996, Cumberland sent Omlin a "Letter of engagement", setting out the terms of their agreement. On September 12, 1996, Omlin signed the letter, agreeing to its terms.

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[1] Reading the complaint charitably, Omlin seeks to assert a claim for negligent or intentional infliction of emotional distress. See complaint at § 10 ("(a)s a direct and proximate result of (K&C's) misrepresented competence, their breach of contract, their breach of fiduciary duty, their negligence, their misleading legal advice and misleading status reports, Appellant ... incurred not only monetary loss, but also mental anguish, pain and suffering")."

[2] Omlin lived in Willoughby, Ohio for about a year, but has since returned to her home country.

K&C proceeded to pursue Omlin's interests on two different fronts. First, with regard to the $1,000.00 judgment, K&C filed a direct appeals of the Willoughby Case, as Omlin had requested, Second, K&C filed a complaint, on Omlin's behalf, against her ex-landlord, asserting claims for breach of contract, invasion of privacy, fraud/misrepresentation, negligence, and breach of the Ohio Landlord-Tenant Act (the "Cuyahoga Case"). Later, K& C also filed a motion for relief from judgment with the trial court in the Willoughby Case.[3] On December 10, 1996, the state appellate court in the Willoughby Case rejected Omlin's resort to the Hague Convention and dismissed the appeals as untimely. On October 10, 19997, the trial court denied the motion for relief from judgment. Pursuant to Omlin's direction, on November 7, 1997, K&C filed an appeal of the trial court's denial of the motion for relief from judgment in the Willoughby Case.

K&C began work on the Willoughby Case appellate brief. While doing so, Omlin gave K&C a lot of direction regarding the content she wanted in the brief. Early in December of 1997, Omlin suggested she wanted to withhold payment for legal fees until she could read and approve the contents of the appellate brief. K&C refused this arrangement because of the difficulty in coordinating with Omlin who was in another country, and Omlin relented. On January 2, 1998, K& C filed Omlin's brief with the state court of appeals. Three days later, on January 5, 1998, Omlin sent a fax to K&C, which stated:

> I am frustrated by the mistakes in your lawyering, your refusal to apply the Landlord-Tenant Law, and the unsuccessful results. I, therefore, herewith request you:

[3]The motion for relief from judgment in th Willoughby Case was premised on evidence obtained during discovery in the Cuyahoga Case, which seemed to contradict evidence the landlord had submitted at trial in the Willoughby Case.

(a) either try to correct your mistake by following up the appeal on your own costs or
(b) to withdraw as counsel from the Willoughby case as well as the Cuyahoga case.

Please let me have your decision on this by fax tomorrow.

K&C replied the following day, January 6, 1998, stating that it would withdraw as counsel from both cases. K&C also suggested option Omlin could pursue to protect her interests in the two pending cases, adding the statement that, [y]ou must give us specific written instructions of how you wish to have us proceed." Omlin responded the same days, asking K&C to advise the courts in both cases "that at my request you are withdrawing as counsel effective immediately." Omlin added that she would "obtain replacement counsel who will appear on my behalf"

On January 9, 1998, Omlin related to K&C that she had obtained Mr. Rossi as replacement counsel. K& C filed a motion to withdraw In the Cuyahoga Case on January 12, 1998; Mr. Rossi appeared at a case management conference in the Cuyahoga Case on January 14, 1998; and the court granted K&C's motion to withdraw on February 2, 1998. K&C also filed a motion to withdraw in the Willoughby Case, the state appellate court granted this motion on February 19, 1998.

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the

> moving party is entitled to judgment as a matter of law.

Rule 56(e) specifies the materials properly submitted in connection with a motion for summary judgment:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein... The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations nor denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file Celotex Corp. v. Catrett, 477.U.S. 317 (1986).

In reviewing summary judgment motions, this Court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. Adickes v. S.H. Kress Co., 398 U.S. 144 (1970); White v. Turfway Park Racing Ass'n. Inc. 909 F.2d 941, 943-

44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the Court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." Id. at 252.

Summary judgment is appropriate whenever the non-moving party fails to make a showing suffient ot establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 332. Moreover, "the trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479-80 (6th Circuit 1989) (citing Frito-Lay, Inc. v. Willoughby, 863 F.2d 1029, 1034 (D.C. Cir. 1988). The non-moving party is under an affirmative duty to point out specific facts in the record as it has been established which create a genuine issue of material fact" Fulson v. City of Columbus, 801 F. Supp. 1,4 (S.D. Ohio 1992). The non-movant must show more than a scintilla of evidence to overcome summary judgment; it is not enough for the non-moving party to show that there is some metaphysical doubt as to material facts. Id.

In its motion for summary judgment, K&C presents to arguments: (1) Omlin's action is barred by the statute of limitations; and (2) Omlin presented no issue of material fact regarding whether K&C breached any duty it owed to her.[4] Because the Court finds the first of these arguments both

[4] The latter argument is premised, in part, on the fact that Petitioner's own expert failed to find Respondent breached any duty it owed her as counsel.

persuasive and sufficient, it does not reach the second argument.[5]

In Ohio, the statute of limitations for a legal malpractice action is one year. Ohio Rev. Code § 2305.11(A)(1). Zimmie v. Calfee, Halter & Griswold, 43 Ohio St. 3d 54, 538 N.E.2d 398, 401 (Ohio 1989). The limitations period

> begins to run when there is a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later.

Zimmie, 538 N.E.2d at 401. In this case, the second event is the later one.. Omlin's alleged injuries, which put her on notice of a possible need to pursue remedies against K&C, were K&C's perceived "mistakes in lawyering." Omlin learned of these mistakes, at the latest, on January 5, 1998, when she sent K&C her ultimatum, demanding that K&C "correct its mistakes" or withdraw as counsel. Thus the termination the attorney-client relationship, itself, was the event triggering the running of the limitations period.

The termination of the Omlin's attorney-client relationship occurred on January 6, 1998, when Omlin directed

[5] The Court has some sympathy for Omlin, but only to the extend that there is evidence that she was treated badly by her landlord, who - despite treating her badly - succeeded in obtaining a $1,000.00 judgment against her. Nonetheless, the Court alos notes that Omlin received fair warning from K&C that her chances of success were slim, and that the cost of representation was sure to exceed any monetary benefit. The problems that flow from Omlin's insitence that she wanted to pursue the Willowghby Case and the Cuyahoga Case despite the substantial cost, in order to vindicate herself "on principle", are of her own making.

K&C to advise the courts, in both the Cuyahoga Case and the Willoughby Case, "that at my request you are withdrawing as counsel effective immediately." An attorney-client relationship is not continued or extended, for limitations purposes, by the amount of time it takes the attorney to withdraw as counsel. See Erickson v. Misny, 1996 WL 239883 at *5 (Ohio Ct. App. May 9, 1996), appeal disallowed, 673 N.E.2d 142 (Ohio 1996) (rejecting arguments that, after the client obtained new counsel, the prior attorney-clientship nonetheless continued, until the prior attorney filed his notice of withdrawal or until the prior attorney returned the client's file); Wozniak v. Tonidandel, 699 N.E.2d 555, 559 (Ohio Ct. App. 1997), appeal disallowed, 685 N.E.2d 237 (Ohio 1997) ("Plaintiff's argument that [his attorney's] representation lasted until the court granted his motion to withdraw is meritless. This court recently rejected this very argument and held that in a statue of limitations context the conduct of an attorney can terminate an attorney-client relationship prior to the filing of the notice of withdrawal.) (citing Misny).

Omlin's unequivocal termination of her relationship with K&C on January 6, 1998, triggered the start of her one-year limitations period. Thus, Omlin was required to bring any malpractice claim against K&C on or before January 6, 1999. She filed this action on January 8, 1999. Accordingly, her action is time-barred.

In her opposition to K&C's motion for summary judgment, Omlin argues that this action is "not a malpractice action, but a breach of contract claim." Opposition brief at 4. Omlin asserts, accordingly,, that the applicable limitations period is 15 years, not one year. See Ohio Rev. Code §2305.06 (providing that the applicable limitations period for bringing an action on a written contract is 15 years).

Case law makes it clear, however, that "[i]n Ohio the applicable statute of limitations is determined not from the form of pleading or procedure, but from the gist of the

complaint." Ward v. Lynch, 1995 WL 723299 at *3 (Ohio Ct. App. Dec. 7, 1995). An "action against one's attorney for damages resulting from the manner in which the attorney represented the client constitutes an action for malpractice within the meaning of R.C. 2305.11, regardless of whether predicated upon contract or tort or whether for indemnification or for direct damages."Muir v. Hadler Real Estate Mgmt. Co., 446 N.E.2d 820, 822 (Ohio Ct. App. 1982) (citations omitted). The Muir court continued: "[m]alpractice by any other name still constitutes malpractice . . . .[U]professional misconduct may consist either of negligence or of the breach of the contract of employment. It makes no difference whether the professional misconduct is found in tort or contract, it still constitutes malpractice. Accordingly, the one year malpractice statute of limitations set forth in R.C. 2305.11 is applicable." Id.

In this case, [a]lthough [Omlin's] complaint alleges breach of contract, there is no question that the gist of [her]complaint is for legal malpractice subject to the one year statute of limitations in R.C. §2305.11(A)". Lynch, 1995 WL 723299 at *3. Because she did not file her complaint in this case until after the limitations period had ended, K&C is entitled to summary judgment, as a matter of law.

IT IS SO ORDERED.

/s/
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

APPENDIX C

00-4003/4142
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Entered on
June 29, 2001

GABRIELE OMLIN
Plaintiff-Appellant
v.
KAUFMAN 6 CUMBERLAND COMPANY, L.P.A.
Defendant-Appellee

ORDER

Before: BOOGS and CLAY, Circuit Judges; and
ROBERTS, * District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and the decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

---

* Hon. Victoria A. Roberts, United States District Judge for the Eastern Division of Michigan, sitting by designation.

APPENDIX D

UNITED STATES DISTRIC COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action, File Number _____

Filed 99 Jan-8 PM 2:39
Clerk U.S. District Court
Northern District of Ohio
Case No. 1:99CV0047
Judge Kathleen O'Malley
Mag. Judge Perelman

GABRIELE OMLIN
Plaintiff
v.
KAUFMAN & CUMBERLAND CO., L.P.A.
Defendant.

COMPLAINT
(Jury Demand Endorsed Hereon)

1. Plaintiff is a citizen and resident of Switzerland and defendant is an association of law practicing attorneys incorporated under the laws of the State of Ohio having its principle business in Cuyahoga County in the Eastern Division of the Northern District of Ohio.

2. On or about August 2 of 1996, plaintiff contacted Mr. Frank Cumberland seeking legal advise in a landlord/ tenant matter resulting from a lease when plaintiff was a resident in Ohio. Mr. Cumberland assured he has a long-standing experience in the real estate areas as well as in

international law and that he was able to take over the matter himself. On or about September 5, 1996 parties signed a representation agreement confirming that Mr. Cumberland would provided then offered and accepted services in a timely and competent manner himself, occasionally assisted by others (See Exhibit attached.)

3. Kaufman & Cumberland Co. L.P.A. breached this agreement and turned the matter over to legal intern, inexperienced junior associates and non-legal support staff and changed them frequently.

4. The work performed by the staff was below the minimum stand of care. None of the staff was ever fully briefed on the facts nor experienced or competent enough to apply the appropriate laws and rules of procedure and to make proper conclusions on laws and facts.

5. In addition to their negligent conduct Kaufman & Cumberland Co. L.P.A. failed to comply with their fiduciary duty to do the proper discovery work on behalf of the plaintiff. They withheld witnesses named by plaintiff and evidence supplied to them by plaintiff with the explicit instruction to present the papers in court. They declined a settlement without informing plaintiff. They failed to transmit to plaintiff interrogatories.

6. In all their activities Kaufman & Cumberland put their interest to produce work for their junior and non-legal staff ahead of the plaintiff's interest and ahead for their duty to perform timely, competent legal work. This amounted to a dismissal of an appeal because they failed to cite authorities and raise arguments in time, a dismissal of an filed Rule 60(B) motion, a dismissal of a tort action (advised and filled by them) for res judicata reasons.

7. Their negligence amounted not only into the exorbitant fees but produced legal problems. After plaintiff has paid a total of approximately 37,000 Dollars into their trust account, but has not received any usable work, plaintiff told

Kaufman & Cumberland that she would no longer pay for their unprofessional work - under the Consumer Protection Act - and requested that they correct the mistakes caused by their staff on their own expense and by Mr. Cumberland himself. In response they blackmailed plaintiff that they would not file and appeal brief due if plaintiff would not send, by overnight priority mail, another 25,000 Dollar check. Plaintiff paid 10,000 Dollars and finally Kaufman & Cumberland filed the brief. This brief was complied by non-legal staff from two other unsuccessful briefs, failed to state that a municipal court does not have jurisdiction to issue injunctions and failed to cite authorities. On December 14, 1998 this appeal has been again dismissed.

8. Mr. Cumberland's representations were false and fraudulent. He made them knowingly and intentionally for the purpose of inducing plaintiff to enter into a representation agreement and he knowingly and intentionally breached the contract for the purpose to producing billable hours for his junior and non-legal staff and for the purposed of unjustified enrichment.

9. As a direct and proximate result of Kaufman & Cumberland's misrepresented competence, their breach of contract, their breach of their fiduciary duty, their negligence, their misleading legal advise and misleading status reports, plaintiff Gabriele U.C. Omlin incurred expenses to redo their work, international traveling and phone calls in the amount of approx. 150,000 Dollars. In addition, plaintiff will never be able to refile the tort action mishandled by Kaufman & Cumberland and will never be able to collect any of the 529,121.7773 Dollars sought in this tort claim.

10. As a direct and proximate result of Kaufman & Cumberland's misrepresented competence, their breach of their fiduciary duty, their negligence, their misleading legal advice and misleading status reports, plaintiff Gabriele U.C. Omlin incurred not only monetary loss, but also mental anguish, pain and suffering.

11. As further direct and proximate result of Kaufman & Cumberland's misrepresented competence, their breach of their fiduciary duty, their negligence, their misleading legal advice and misleading status reports, plaintiff Gabriele U.C. Omlin has and will incur litigation expenses and attorney fees.

WHEREFORE, Plaintiff demands relief as follows:

1. Judgment against Defendant;
2. An award of special damages in excess of $400,000;
3. An award of compensatory damages for the lost prospective compensation on the tort action in the amount of $529,121.73;
4. Punitive damages in the amount of $500,000;
5. Attorneys' fees and all costs associated with this litigation; and
6. Any and all other relief this court deems just and equitable.

Respectfully submitted,

/s/_____
GABRIELE U.C. OMLIN

APPENDIX E

Letter from: KAUFMAN & CUMBERLAND
1402 East Street, Cleveland Ohio 44114
To: Ms. Gabriele Omlin
Hirzbodenweg 15, CH-4052 Basel,
Switzerland

September 5, 1996

Dear Ms. Omlin:

We are pleased that you have retained Kaufman & Cumberland Co. L.P.A., to represent you in the above-referenced matter. This letter will constitute an agreement between Kaufman & Cumberland Co. L.P.A. ("Kaufman & Cumberland") and Gabriele Omlin ("Client") regarding the terms of which Kaufman & Cumberland will provide legal services for Client. We ask that you read this letter carefully to understand the terms of our representation.

All Firm attorney, paralegals and law clerks are assigned hourly rates and keep detailed records of their time in units not less than tenths of an hour. Each such unit is based upon actual work performed on your case. Such time may be spent on telephone calls relating to your legal matters, including calls with you or opposing counsel; writing letters; doing research; preparing legal documents; conducting negotiations; appearing in court; engaging in meetings or other similar matters.

The legal personnel assigned to your case may confer among themselves about the matter, as required. When they do confer, each person will charge for the time expended. These meetings only occur when it is important that information be shared or when supervision or direction is necessary. Likewise, when it is beneficial to you for more than one of ourlegal

personnel to attend a meeting or other proceeding, each will charge for the time spent.

My hourly rate for this matter will be One Hundred Ninety-five Dollars ($195.00). A schedule of the rates of other professionals in the Firm is attached to this letter. We endeavor to assign work to the lowest-cost person capable of providing the required service in a timely, competent manner. This means that occasionally, I will be assisted by others with whom you may have direct contact, including legal assistants. We believe that such direct contact is essential in order to avoid duplication of effort and miscommunication. These expenses include, but are not limited to, copying charges, facsimile (fax) transmission charges, secretarial overtime, travel expenses, courier delivery, Lexis© or Westlaw© (computer assisted research) charges, fees paid to court reporting services, filing fees and other similar expenses. A schedule of charges for certain of our in-house expenses is attached to this letter. Any such cost will only be incurred in furtherance of your case and with respect to significant expenses, such as expert witness fees, only with your permission (except in the event of expenditures which must be made on an emergency basis in order to protect your interests).

We will bill you on a monthly basis. Our invoices will state the total amount due for services rendered and expenses provided to you during the billing period. Each invoice will be accompanied by a detailed description of the specific services rendered and the date on which such services were rendered. All invoices for services rendered are due within thirty (30) days of the invoice date. Any invoices not paid within thirty (30) days of receipt shall accrue interest at a rate of 0.83 percent (.83%) of the outstanding balance per month, compounded.

It is our Firm policy that if any statement remains unpaid for a period of sixty days after issuance, we reserve the right to cease work on the matter until the delinquency has been

rectified or acceptable arrangements made for payment of the past due balance.

While we are constantly striving to maintain our fees at their current levels, our hourly rates may, from time to time, have to be increased. This may occur if there is any significant span of time which elapses during the course of our representation. We can assure you, however, that if and when such increases occur, you will be notified in advance of the increase. Changes in hourly rates will be effective for time charged after the effective date of the change.

Because of the considerable amount of time which will be initially invested in your case, and in line with Firm policy, we have requested a retainer of Five Thousand Dollars ($5,000.00). Your money order in the amount of $5,000.00 was received by our office on August 22, 1996. The retainer shall be applied against charges on your account. The current status of your retainer will appear on each bill you receive. We may require additional retainers in the future to be applied in a similar manner.

After you have reviewed the foregoing, we would appreciate your acknowledgment of receipt of this letter and agreement with its terms by signing a copy of this letter and returning it to our office at your earliest convenience. We have already opened a file and will take whatever steps are necessary to protect your interests in the interim, but must have an executed copy of this letter in our files, in any event.

We are pleased to present you in this matter and I assure you that we will pursue the matter diligently and expeditiously.

Very truly yours,

/s/_____
Frank J. Cumberland

I accept the foregoing arrangements for legal representation by Kaufman & Cumberland Co. L.P.A.

/s/ _____
GABRIELE OMLIN
Basel, Sept. 12, 1996

FJC/lgc

APPENDIX F

Letter from: KAUFMAN & CUMBERLAND
1402 East Street, Cleveland Ohio 44114
To: Ms. Gabriele Omlin
Hirzbodenweg 15, CH-4052
Basel, Switzerland
January 8, 199

Dear Gabriele:

Thanks for your fax of January 6, 1998. We understand, and agree with, your New Year's resolution to move on to other things. We also have to admit that we agree with the advice you received from your friend in Boston - you will have a much less stressful year if you stay away from U.S. attorneys. We sincerely trust that you do not lay the responsibility for the stress you feel over the Ursettis, Dan Taylor an Judge Allen at our feet. Believe it or not, we have and continue to be, firmly on your side, and deeply committed to advancing your interests in the best way we know.

Having said all this, there are still a few loose ends we would like to tie down for you. First, the Court of Appeals granted our request for oral argument. We just learned of this. It does not make sense for you to have another attorney come in and get up to speed for this proceeding, and it will be very prejudicial if you have someone appear for you, not fully prepared. A bad oral argument will almost certainly guaranty a loss for you, and the odds are already against you. We therefore ask you that you allow one of us to do this argument on your behalf. You can pay us for the time, or not, as you see fit. Since oral argument is the only thing left.

On the Cuyahoga County case, we still recommend that you allow us to file a voluntary dismissal, rather than withdraw. The dismissal will be, as Dave explained in a previous letter to you, *without prejudice*. This means you will

have one full year to reconsider your position, get whatever tests you want or need, and then decide whether to pursue the matter. Rule 41 allows you to do this; the running of the statute has no application. The choice is yours, but if you really to want to stay away from lawyers this year, a voluntary dismissal without prejudice is the best way to do that.

Given this options, please let us know how you wish to have us proceed. We will of course honor your request to withdraw from both cases immediately if that is still your desire, but we would prefer to at least finish that which we have started. We will wait for your decision.

We, like you, have no adverse or bad feelings over this matter other than the obvious. Our clients often become emotionally involved in their cases, which requires at times that we take strong positions. Dealing with that is part of our job. We also respect your need to "have some time out"; after a reasonable break, we can discuss how to handle your outstanding balance with the firm. As your "escrow agent," I will also need instruction concerning the two Swatch watches in my safe. I have spoken with Dave who assures me that he is not at all reluctant to return the two he has, to keep the set together, and return them all to you.

We wish you a happy, healthy and stress-free New Year, Gabriele, and look forward to hearing from you.

Very truly yours,

/s/_____

FJC/mlb Frank J. Cumberland

SUPREME COURT, U.S.
FILED
OCT 12 2001
OFFICE OF THE CLERK

No. 01-519

IN THE

Supreme Court of the United States

GABRIELE OMLIN,

Petitioner,

v.

KAUFMAN & CUMBERLAND COMPANY, L.P.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

MARK PATRICK O'NEILL
WESTON HURD FALLON PAISLEY & HOWLEY L.L.P.
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QUESTION PRESENTED

Should the Supreme Court accept for review the decisions of federal courts in Ohio which correctly applied the Ohio statute of limitations for lawyer malpractice in an action venued in Ohio against Ohio lawyers alleging malpractice in their conduct of litigation for the client in Ohio state courts, where no federal question or constitutional issue was involved?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Kaufman & Cumberland Company, L.P.A., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Respondent respectfully prays that the petition for a writ of certiorari be denied.

OPINIONS BELOW

The order of the Court of Appeals for the Sixth Circuit is satisfactorily reprinted as Appendix A to the petition, as is the order of the Court of Appeals denying petitioner's motion for rehearing and rehearing en banc, which is Appendix C to the petition.

Petitioner's Appendix B — the opinion and order of the district court — is not printed verbatim and is marred by many typographical and editorial mistakes. The district court's order as correctly reprinted appears as Appendix A to this brief.

STATEMENT OF THE CASE

Petitioner, a citizen of Switzerland, visited northern Ohio for business reasons in October, 1994 and rented a house in Willoughby Hills, Lake County, Ohio for a term expiring on March 31, 1996. She and her landlord developed a hostile relationship because of his intrusive visits to the site, ostensibly to inspect the property. When she attempted to curtail his inspections to only once a month, he filed suit in the Lake County Municipal Court to enforce his right to inspection under the Ohio Landlord-Tenant Act. He also sought attorneys' fees, as permitted by that act. Ms. Omlin engaged counsel who filed an answer and counterclaim on February 29, 1996. On March 5, 1996 a hearing was held before a magistrate at which both parties were present and were represented by legal counsel. *See Ursetti v. Omlin*, unreported, 1998 Ohio App. LEXIS 5989 (December 11,

1998) *4. The parties then agreed on a date and time for the landlord to inspect the property. The magistrate ordered the inspection to go forward as agreed. On March 19, 1996 the trial court adopted the magistrate's order as its own and scheduled a pretrial conference for April 2, 1996. On March 25, 1996 Ms. Omlin's counsel filed a motion to withdraw the counterclaim against the landlord and a motion to withdraw as her counsel, pursuant to her request. *Ibid.* The trial court granted both motions the following day. As of March 26, 1996, Ms. Omlin was proceeding *pro se*.[1]

Her visa to the United States was to expire in four days, on March 30, 1996. On March 30, 1996, she filed a letter with the court stating that she was not available for a pretrial conference on April 2 "or any further trial" because her visa had expired. *Id.**5. The magistrate conducted the pretrial conference on April 2, 1996. Ms. Omlin was not present. He recommended that the court hold a trial on the question of whether the landlord was entitled to any damages or attorneys' fees. The court issued an order on April 3, 1996 ordering trial on May 15, 1996. *Id.**6. The landlord's counsel moved for a continuance. On April 16, 1996 the court granted the continuance and rescheduled the trial for May 24, 1996. On May 23, 1996 Ms. Omlin sent the court a facsimile transmission from Switzerland containing an affidavit in which she acknowledged receipt of the trial court's orders of April 3 and April 16, 1996. *Ibid.* She stated that she would be unable to appear for trial on May 24. She did not request a continuance. Her affidavit contained averments denying the landlord's allegations, implying that she wished the court to consider those averments in place of her live testimony. *Id.**6-7.

---

1. The statement in petitioner's brief on p. 3 that before she went home "the matter was settled by agreement" is not factual. The litigation continued.

The case proceeded to trial before a magistrate on May 24, 1996. *Id.**7. Ms. Omlin did not appear and there was no counsel to represent her. Only the landlord testified. *Ibid.* On May 31, 1996 the magistrate filed a written decision finding that Ms. Omlin failed to allow her landlord to inspect the premises after reasonable notice, that she damaged the garage door opener in the amount of $320, and that the landlord was entitled attorneys' fees of $680. *Id.**7-8. The magistrate recommended that judgment be rendered for the landlord for $1,000 and that he should keep her $1,000 security deposit to satisfy the judgment. *Id.* *8. On June 27, 1996 the court adopted the magistrate's decision and entered judgment against Ms. Omlin in the amount of $1,000 plus 10% interest. *Ibid.* A copy of the judgment entry was mailed to her address in Switzerland. *Ibid.* She allegedly did not receive it until July 26, 1996. *Ibid.* Under Ohio law the last day for filing a notice of appeal was July 27, 1996.[2]

On or about Friday, August 2, 1996 Ms. Omlin spoke by telephone to Frank Cumberland, a principal in the Cleveland firm Kaufman & Cumberland. The time for filing a notice of appeal had expired. Mr. Cumberland agreed to represent her after explaining the risks of nonsuccess and the potential for more expense than the judgment warranted. He filed a notice of appeal to the Lake County Court of Appeals on August 23, 1996, and in subsequent briefs he argued that the Hague Convention gave Ms. Omlin more time to appeal than was afforded by the Ohio Rules of Appellate Procedure.

---

2. Petitioner's statement on page 4 of her brief that "on July 27, 1996 petitioner sent by fax a notice of appeal" seems to be unfactual. There is no record of any timely notice of appeal sent by her — by fax or otherwise.

In an opinion rendered on December 2, 1996 the Court of Appeals for Lake County held that she failed to qualify for the relief provided by Article 16 of the Hague Convention because she had appeared in the action prior to the judgment against her. The extension of time available under the Hague Convention could only be obtained by those who had suffered default judgments in cases in which they had not appeared at all. Ms. Omlin had appeared on February 29, 1996 by filing her answer and counterclaim. Because she had received notice of the suit and had entered an appearance, and was aware of the trial date, and did not arrange for a continuance or for coverage by counsel, and had provided evidence to the trial court by affidavit *in absentia*, the Court of Appeals concluded that relief was not available under the Hague Treaty. *Ursetti v. Omlin*, unreported, Case No. 96-L-147, Court of Appeals of Ohio, 11th Dist., December 2, 1996.

After the Court of Appeals dismissed her appeal, Ms. Omlin instructed her lawyers not to appeal to the Ohio Supreme Court. Kaufman & Cumberland then filed a separate action for her against her ex-landlord in the Common Pleas Court of Cuyahoga County, Ohio. They deposed the landlord and his wife. On the basis of that testimony she filed a motion for relief from the $1,000 judgment in the Willoughby Municipal Court, seeking vacation of that judgment because it was obtained by fraud of the prevailing party. On August 15, 1997 a hearing on that motion was held before a magistrate. Ms. Omlin returned from Switzerland for the hearing and both she and her ex-landlord testified. The magistrate issued a written opinion in which he recommended that her Rule 60(B) motion be denied. She filed objections. On October 10, 1997 the court overruled her objections and adopted the magistrate's recommendation. Kaufman & Cumberland filed a motion for reconsideration and a notice of appeal and began their brief to the Court of Appeals in November, 1997.

In December, 1997 Ms. Omlin informed Mr. Cumberland that she would withhold payment on outstanding invoices until he could show her a brief which she approved for filing in the Court of Appeals. Cumberland refused to agree to this. He told her by fax on December 4, 1997 that she could either pay her bills or find other counsel. On December 5, 1997 she promised to pay and asked Cumberland not to stop work. Kaufman & Cumberland completed their brief and filed it with the Court of Appeals on January 2, 1998.

On January 5, 1998 Ms. Omlin faxed Cumberland an ultimatum. She said she was "frustrated by the mistakes in your lawyering, your refusal to apply the Landlord-Tenant Law, and the unsuccessful results." She demanded:

> Either try to correct your mistakes by following up the appeal on your own costs or withdraw as counsel from the Willoughby case as well as the Cuyahoga case. Please let me have your decision on this by fax by tomorrow.

Cumberland replied by fax on January 6 that he would ask the courts for permission to withdraw. He asked her to provide concise instructions suitable for attachment to a motion to withdraw. She immediately responded with two faxes on January 6, 1998 instructing Cumberland and his associate to withdraw as her counsel from both cases "effective immediately." She promptly engaged other counsel to represent her.

On January 8, 1999, one year and two days after she terminated her attorney-client relationship with Kaufman & Cumberland, Ms. Omlin filed a malpractice complaint against them in the U.S. District Court for the Northern District of

Ohio. Her complaint was filed two days after the expiration of the Ohio statute of limitations for legal malpractice actions. The district court entered summary judgment for Kaufman & Cumberland on the ground that her action was untimely. The Sixth Circuit affirmed.

REASONS FOR DENYING THE WRIT

1. The judgment of the Sixth Circuit does not invoke any of the grounds for relief recognized by Rule 10 of the Supreme Court Rules.

Rule 10 provides that "A petition of a writ of certiorari will be granted only for compelling reasons." This case presents no compelling reason. The Sixth Circuit's judgment does not conflict with any decision of another circuit on the same question. The Sixth Circuit did not decide an important federal question in a way that conflicts with the decision by a state court of last resort. It did not decide an important federal question in a way that conflicts with relevant decisions of this Court. And its judgment has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

2. The courts below properly applied Ohio law concerning the period of limitations for actions against lawyers for malpractice.

In Ohio the statute of limitations for lawyer malpractice is one year. Ohio Revised Code Section 2305.11(A)(1) provides:

> [A]n action for . . . malpractice other than an action upon a medical, dental, optometric or

> chiropractic claim . . . shall be commenced within one year after the cause of action accrues.

An action for lawyer malpractice accrues and the statute of limitations begins to run

> when there is a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney, or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later.

Zimmie v. Calfee Halter & Griswold, 43 Ohio St. 3d 54 (1989), syllabus.

Ms. Omlin's cause of action against Kaufman & Cumberland accrued on January 6, 1998 because that was the date on which she terminated the attorney-client relationship with prior knowledge of their "mistakes in lawyering." Her fax of the previous day, January 5, 1998, itemized the firm's alleged mistakes:

- Not basing the Rule 60(B) motion on the Landlord-Tenant Law.
- Not using the testimony of additional witnesses at the hearing on the 60(B) motion.
- Not making full use of the evidence in their files.
- Not doing adequate research.

- Failing to challenge the eviction summons on additional grounds.

- Not bringing to the municipal court's attention the three-day notice provision in the Landlord-Tenant Law.

Her knowledge of the firm's alleged malpractice thus occurred before she terminated the relationship.

Because the Ohio statute of limitations accrues upon the later of two events — discovery of attorney errors or termination of the relationship — Ms. Omlin's fax of January 6, 1998 marked the accrual date for the statute of limitations. The Ohio cases recognize that an attorney-client relationship may be dissolved by either party upon clear and unambiguous notice to the other. *Flynt v. Brownfield Bowen & Bally*, 882 F.2d 1048, 1050-52 (6th Cir. 1989) (letter from attorney); *Hickle v. Malone*, 110 Ohio App. 3d 703, 706-07 (1996) (letter); *Wozniak v. Tonidandel*, 121 Ohio App. 3d 221, 226 (1997) (oral notice and letter); *Brown v. Johnstone*, 5 Ohio App. 3d 165 (1982) (letter of complaint to grievance committee).

When the termination of the attorney-client relationship has been signaled by unambiguous communication, the relationship is not extended for statute of limitations purposes by the time it takes the attorney to obtain court approval to withdraw. *Wozniak v. Tonidandel*, 121 Ohio App. 3d 221 (1997); *Flynt v. Brownfield Bowen & Bally*, 882 F.2d 1048, 1050-52 (6th Cir. 1989).

Both lower courts correctly applied Ohio law to the undisputed facts, and Ohio law controls. The cases cited by

petitioner at pages 13-21 draw upon decisions expressive of the laws of other states — Arkansas, Texas, Arizona, Florida, Illinois, Alaska and Tennessee. All of these are irrelevant. Ohio law is the governing law and must be applied by federal courts sitting in Ohio.[3]

The discussion of the Ohio cases cited in the petition at pages 18-21 is marred by confusion of dissenting opinions with majority opinions and blends dissenting language with majority holdings. It is unhelpful and misleading.

3. The Sixth Circuit's decision does not disallow breach of contract suits against attorneys.

Ohio attorneys are responsible for their contractual obligations, and breach of contract actions can be brought against them in appropriate cases. However, actions against Ohio attorneys for breach of their professional duties to clients — whether characterized in pleadings as an action for breach of contract, breach of fiduciary duty, fraud or negligence — are all deemed actions for professional malpractice governed by the one-year statute of limitations. *Hibbett v. Cincinnati*, 4 Ohio App. 3d 128, 131 (1982); *Muir v. Hadler Real Estate*

---

3. 28 U.S.C.A. § 1652, the Rules of Decision Act, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as the rules of decision in civil actions in the courts of the United States, in cases where they apply.

Cases holding that state statutes of limitations must be applied by federal courts in malpractice cases include *Summers v. Wallace Hospital*, 270 F.2d 831, 833 (9th Cir. 1960) and *FDIC v. Alexander*, 78 F.3d 1103 (6th Cir. 1996).

Management Co., 4 Ohio App. 3d 89, 90 (1982); *Ward v. Lynch*, unreported, 1995 WL 723299 *3; *Erickson v. Misny*, unreported, 1996 WL 239883, pp. 5-6.

The *Muir* decision does not impair the obligations of contracts. *Muir* does not create "two classes of people (the class of attorneys/law firms who cannot be sued for breach of contract . . . and the class of clients who can be sued for breach of contract, but cannot sue their attorneys/law firms for breach of contract)" as petitioner argues at page 23. Neither *Muir* nor any other Ohio case on the statute of limitations for lawyer malpractice presents a due process issue, as petitioner claims. The decisions of the courts below do not grant immunities to lawyers which do not attach to any other class of citizens. No equal protection or due process issue is presented by this case.

4. The courts below did not fail to consider Petitioner's amended complaint or her opposing affidavits.

The district court granted summary judgment because the action was not commenced within the time limited by the Ohio statute of limitations. Petitioner failed to offer *evidence* creating a jury issue on that defense. Her two-page affidavit and her five-page affidavit, both executed in Basel, Switzerland on February 11, 2000, are devoid of facts creating a jury issue on the statute of limitations defense. Petitioner's amended complaint was insufficient by itself to raise a jury issue. In resisting a motion for summary judgment a party may not rely upon mere pleadings. The party's burden is to offer evidence which opposes the adversary's evidence and demonstrates the existence of an issue for the trier of fact. Ms. Omlin could not do that because the uncontradicted documented evidence established that her complaint was filed two days late.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION DATED AND FILED JULY 6, 1998

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:99CV00047
JUDGE O'MALLEY

GABRIELE OMLIN,

Plaintiff,

v.

KAUFMAN & CUMBERLAND CO.,

Defendant.

MEMORANDUM & ORDER

Plaintiff Gabriele Omlin, a citizen of Switzerland, brings this action pro se against her former Cleveland, Ohio law firm, Kaufman & Cumberland Co., L.P.A. ("K&C"). In her complaint, Omlin alleges that: (1) the work performed by K&C "was below the minimum standard of care," complaint at ¶4; (2) K&C "failed to comply with [its] fiduciary duty to do the proper discovery work," *id.* at ¶5; and (3) K&C made "false and fraudulent" misrepresentations to her, "for the purpose of inducing [her] to enter into a representation agreement," *id.* at ¶8. In her complaint, Omlin does not

separately set out her claims; a fair reading of the complaint, however, suggests she seeks to assert claims for breach of contract, breach of fiduciary duty, and fraud.[1] The Court has diversity jurisdiction over this action, pursuant to 28 U.S.C. §1332(a)(2).

K&C has filed a motion for summary judgment (docket no. 37), and Omlin has filed a cross-motion for summary judgment (docket no. 42). For the reasons stated below, K&C's motion is **GRANTED**, Omlin's motion is **DENIED**, and this case is **DISMISSED**.

I.

The following material facts are not in dispute. Omlin's initial contact with K&C occurred on August 2, 1996, when she met with attorney Frank Cumberland. Omlin asked Cumberland to represent her in connection with a legal dispute she had with her landlord.[2] The landlord had already obtained a $1,000.00 judgment against her in Willoughby, Ohio Municipal Court, and she wanted the judgment vacated or reversed (the "Willoughby Case"). Unfortunately for

---

1. Reading the complaint charitably, Omlin also seeks to assert a claim for negligent or intentional infliction of emotional distress. *See* complaint at ¶10 ("[a]s a direct and proximate result of [K&C's] misrepresented competence, their breach of contract, their breach of fiduciary duty, their negligence, their misleading legal advice and misleading status reports, plaintiff . . . incurred not only monetary loss, but also mental anguish, pain and suffering").

2. Omlin lived in Willoughby, Ohio for about a year, but has since returned to her home country.

Omlin, when she first met with Cumberland, the time within which to file a timely appeal of the Willoughby Case trial court judgment had already expired. K&C explained this to Omlin, but she was insistent on pursuing an appeal anyway; she urged K&C to argue on appeal that the Hague Convention allowed her additional time. K&C decided it could represent Omlin, so, on September 5, 1996, Cumberland sent Omlin a "letter of engagement," setting out the terms of their agreement. On September 12, 1996, Omlin signed the letter, agreeing to its terms.

K&C proceeded to pursue Omlin's interests on two different fronts. First, with regard to the $1,000.00 judgment, K&C filed a direct appeal of the Willoughby Case, as Omlin had requested. Second, K&C filed a complaint, on Omlin's behalf, against her ex-landlord, asserting claims for breach of contract, invasion of privacy, fraud/misrepresentation, negligence, and breach of the Ohio Landlord-Tenant Act (the "Cuyahoga Case"). Later, K&C also filed a motion for relief from judgment with the trial court in the Willoughby Case.[3] On December 10, 1996, the state appellate court in the Willoughby Case rejected Omlin's resort to the Hague Convention and dismissed the appeal as untimely. On October 10, 1997, the trial court denied the motion for relief from judgment. Pursuant to Omlin's direction, on November 7, 1997, K&C filed an appeal of the trial court's denial of the motion for relief from judgment in the Willoughby Case.

---

3. The motion for relief from judgment in the Willoughby Case was premised on evidence obtained during discovery in the Cuyahoga Case, which seemed to contradict evidence the landlord had submitted at trial in the Willoughby Case.

Appendix

K&C began work on the Willoughby Case appellate brief. While doing so, Omlin gave K&C a lot of direction regarding the content she wanted in the brief. Early in December of 1997, Omlin suggested she wanted to withhold payment for legal fees until she could read and approve the contents of the appellate brief. K&C refused this arrangement because of the difficulty in coordinating with Omlin who was in another country, and Omlin relented. On January 2, 1998, K&C filed Omlin's brief with the state court of appeals. Three days later, on January 5, 1998, Omlin sent a fax to K&C, which stated:

> I am frustrated by the mistakes in your lawyering, your refusal to apply the Landlord-Tenant Law, and the unsuccessful results. I, therefore, herewith request you:
>
> > (a) either try to correct your mistakes by following up the appeal on your own costs or
> >
> > (b) to withdraw as counsel from the Willoughby case as well as the Cuyahoga case.
> >
> > Please let me have your decision on this by fax tomorrow.

K&C replied the following day, January 6, 1998, stating that it would withdraw as counsel from both cases. K&C also suggested options Omlin could pursue to protect her interests in the two pending cases, adding the statement that, "[y]ou

must give us specific written instructions of how you wish to have us proceed." Omlin responded the same day, asking K&C to advise the courts in both cases "that at my request you are withdrawing as counsel effective immediately." Omlin added that she would "obtain replacement counsel who will appear on my behalf."

On January 9, 1998, Omlin related to K&C that she had obtained Mr. Rossi as replacement counsel. K&C filed a motion to withdraw in the Cuyahoga Case on January 12, 1998; Mr. Rossi appeared at a case management conference in the Cuyahoga Case on January 14, 1998; and the court granted K&C's motion to withdraw on February 2, 1998. K&C also filed a motion to withdraw in the Willoughby Case; the state appellate court granted this motion on February 19, 1998.

II.

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . .

Rule 56(e) specifies the materials properly submitted in connection with a motion for summary judgment:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts

> as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein .... The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In reviewing summary judgment motions, this Court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration

of the applicable evidentiary standards. Thus, in most civil cases the Court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252.

Summary judgment is appropriate whenever the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322. Moreover, "the trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989) (citing *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1034 (D.C. Cir. 1988)). The non-moving party is under an affirmative duty to point out specific facts in the record as it has been established which create a genuine issue of material fact. *Fulson v. City of Columbus*, 801 F. Supp. 1, 4 (S.D. Ohio 1992). The non-movant must show more than a scintilla of evidence to overcome summary judgment; it is not enough for the non-moving party to show that there is some metaphysical doubt as to material facts. *Id.*

III.

In its motion for summary judgment, K&C presents two arguments: (1) Omlin's action is barred by the statute of limitations; and (2) Omlin presented no issue of material fact regarding whether K&C breached any duty it owed to her.[4]

---

4. The latter argument is premised, in part, on the fact that Omlin's own expert failed to find K&C breached any duty it owed her as counsel.

Because the Court finds the first of these arguments both persuasive and sufficient, it does not reach the second argument.[5]

In Ohio, the statute of limitations for an action for legal malpractice is one year. Ohio Rev. Code §2305.11(A)(1); *Zimmie v. Calfee, Halter & Griswold*, 538 N.E.2d 398, 400 (Ohio 1989). The limitations period

> begins to run when there is [1] a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney or [2] when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later.

Zimmie, 538 N.E.2d at 401. In this case, the second event is the later one. Omlin's alleged injuries, which put her on notice of a possible need to pursue remedies against K&C, were K&C's perceived "mistakes in lawyering." Omlin learned of

---

5. The Court has some sympathy for Omlin, but only to the extent that there is evidence that she was treated badly by her landlord, who — despite treating her badly — succeeded in obtaining a $1,000.00 judgment against her. Nonetheless, the Court also notes that Omlin received fair warning from K&C that her chances of success were slim, and that the cost of representation was sure to exceed any monetary benefit. The problems that flow from Omlin's insistence that she wanted to pursue the Willoughby Case and the Cuyahoga Case despite the substantial cost, in order to vindicate herself "on principle," are of her own making.

these mistakes, at the latest, on January 5, 1998, when she sent K&C her ultimatum, demanding that K&C "correct its mistakes" or withdraw as counsel. Thus, the termination of the attorney-client relationship, itself, was the event triggering the running of the limitations period.

The termination of the Omlin's attorney-client relationship occurred on January 6, 1998, when Omlin directed K&C to advise the courts, in both the Cuyahoga Case and the Willoughby Case, "that at my request you are withdrawing as counsel effective immediately." An attorney-client relationship is not continued or extended, for limitations purposes, by the amount of time it takes the attorney to withdraw as counsel. *See Erickson v. Misny*, 1996 WL 239883 at *5 (Ohio Ct. App. May 9, 1996), *appeal disallowed*, 673 N.E.2d 142 (Ohio 1996) (rejecting arguments that, after the client obtained new counsel, the prior attorney-client relationship nonetheless continued until the prior attorney filed his notice of withdrawal or until the prior attorney returned the client's files); *Wozniak v. Tonidandel*, 699 N.E.2d 555, 559 (Ohio Ct. App. 1997), *appeal disallowed*, 685 N.E.2d 237 (Ohio 1997) ("Plaintiff's argument that [his attorney's] representation lasted until the court granted his motion to withdraw is meritless. This court recently rejected this very argument and held that in a statute of limitations context the conduct of an attorney can terminate an attorney-client relationship prior to the filing of the notice of withdrawal.") (citing *Misny*).

Omlin's unequivocal termination of her relationship with K&C on January 6, 1998, triggered the start of her one-year limitations period. Thus, Omlin was required to bring any

malpractice claim against K&C on or before January 6, 1999. She filed this action on January 8, 1999. Accordingly, her action is time-barred.

In her opposition to K&C's motion for summary judgment, Omlin argues that this action is "not a malpractice action, but a breach of contract claim." Opposition brief at 4. Omlin asserts, accordingly, that the applicable limitations period is 15 years, not one year. *See* Ohio Rev. Code §2305.06 (providing that the applicable limitations period for bringing an action on a written contract is 15 years). Case law makes it clear, however, that "[i]n Ohio the applicable statute of limitations is determined not from the form of pleading or procedure, but from the gist of the complaint." *Ward v. Lynch*, 1995 WL 723299 at *3 (Ohio Ct. App. Dec. 7, 1995). An "action against one's attorney for damages resulting from the manner in which the attorney represented the client constitutes an action for malpractice within the meaning of R.C. §2305.11, regardless of whether predicated upon contract or tort or whether for indemnification or for direct damages." *Muir v. Hadler Real Estate Management Co.*, 446 N.E.2d 820, 822 (Ohio Ct. App. 1982) (citations omitted). The *Muir* court continued: "[m]alpractice by any other name still constitutes malpractice. . . . [U]nprofessional misconduct may consist either of negligence or the breach of contract of employment. It makes no difference whether the professional misconduct is founded in tort or contract, it still constitutes malpractice. Accordingly, the one year malpractice statute of limitations set forth in R.C. 2305.11 is applicable." *Id.*

In this case, "[a]lthough [Omlin's] complaint alleges a breach of contract, there is no question that the gist of [her]

claim is for legal malpractice subject to the one year statute of limitations in R.C. §2305.11(A)." *Lynch*, 1995 WL 723299 at *3. Because she did not file her complaint in this case until after the limitations period had ended, K&C is entitled to summary judgment, as a matter of law.

IT IS SO ORDERED.

s/ Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

Appendix

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:99CV00047
JUDGE O'MALLEY

GABRIELE OMLIN,

Plaintiff,

v.

KAUFMAN & CUMBERLAND CO.,

Defendant.

ORDER

For the reasons set forth in this Court's memorandum and order of this date, the defendant's motion is **GRANTED**, the plaintiff's motion is **DENIED**, and this case is **DISMISSED**.

IT IS SO ORDERED.

s/ Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
NOV 8 2001

(3)

No.. 01-519

IN THE
Supreme Court of the United States

GABRIELE OMLIN,

Petitioner,

v.

KAUFMAN & CUMBERLAND L.P.A.,

Respondent.

On Petition for Writ of Certiorari to the Unites States Court of Appeals for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

GABRIELE OMLIN
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Petitioner Pro Se

15 pp

QUESTIONS PRESENTED

1. Whether a state statute of limitations for legal malpractice should be tolled until the underlying adverse decision is affirmed on appeal and an injury in fact and the standing to sue is established?

2. Whether federal courts should adopt an intermediate state court decision and grant a law firm, incorporated as legal professional association, immunity from being sued for breach of written contract, breach of fiduciary duty, fraud, negligence, and infliction of emotional distress?

3. Whether a properly amended complaint and court certified copies of state courts' proceedings and an opposing affidavit supported by copies of the business record are material of the type specified under Fed. R. Civ. P. 56(c) to be considered in determining whether to grant judgment as a matter of law?

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Petitioner appreciates Respondent's correction of Appendix B to the Petition.

1. Respondent errs in its cross-question presented that the case does not involve federal questions or constitutional issues (Brief in Opp. p. *i*)

Respondent's cross question

> "Should the Supreme Court accept for review the decisions of federal courts in Ohio which correctly applied the statute of limitations for lawyer malpractice in an action venued in Ohio against Ohio lawyers alleging malpractice in their conduct of litigation for the client in Ohio state courts, where no federal question or constitutional issue was involved?"

is - if of any bearing - fairly contained in Petitioner's three questions presented for review. (p.i. before).

Petitioner's action is not "an action venued in Ohio against Ohio lawyers alleging malpractice in their conduct of litigation for the client in Ohio state courts", but is an action for breach of written contract, breach of fiduciary duty and fraud against a corporation incorporated as legal professional association in Ohio (Pet, p.22; Brief in Opposition, Appendix B, p.2a, District Court Memorandum & Order).

The court below did not correctly apply the state statute of limitations for lawyer malpractice (see § 3, p.3 below) and its decision invokes both constitutional and federal questions (see § 4 through § 6, p.5 – p.9 below).

2. Both perceived misstatements pointed out in Respondent's brief in compliance with Rule 15.2 of this Court did not occur

rendering the statement of the case as set out in Petitioner's brief the undisputed facts material to consideration of the questions presented for review.

Rule 15.2 of this Court mandates that

> " *** the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition."

Respondent points out two of such perceived misstatements both of which were erroneously identified as unfactual:

> (a) Footnote 1: The statement is factual[1]. the inspection issue was settled by agreement (Joint App. p.1089; R.[2] 45, Vol. 3-3, E-20).

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[1] The perceived misstatement is not on page 3 of petitioner's brief, but on page 4.

[2] R = Record in the district court.

(b) Footnote 2: The facsimile notice[3] of appeal is reflected in the record (Joint App. p.586; R. 43, Vol. 1-22, Court certified copy of the municipal court docket sheet case no. 96CVG-00205).

Respondent's remaining statement of the case does not point out any other perceived misstatements. It is a mixture of statements of fact and law misrepresented/misapplied by respondent's various employees in their state courts' pleadings and consequently reflected in the state courts' judgments. These statements contain material identified by petitioner on appeal as genuine issues of fact and law (Pet. p.8 – p.10). The page limitation of this brief does not allow them all to be corrected individually. Therefore, Respondent's statement of the case is herewith summarily objected and those misstatements/omissions material to consideration of the questions presented for review are individually corrected in the endnote (p.10 below) as far as possible within the page limitation.

3. Respondent errs in contending that the decision of the Sixth Circuit does not invoke any of the grounds for review recognized by Rule 10 of this Court

The silent denial of the courts below to toll the state statute of limitations for malpractice until the underlying adverse decision was affirmed on appeal on December 18, 1998 (App. Brief p.29) is in conflict with previous decisions of if own Sixth Circuit, the Fifth Circuit, the Seventh Circuit and the Eleventh Circuit, tolling state statutes of limitations for legal malpractice until the underlying adverse judgment is affirmed on appeal and the injury is certain (Pet. p.12 – p.21).

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3 Due to the time difference this fax dated July 27, 1996 was already received/entered in the court journal on 07-26-96.

The Sixth Circuit's decision is further in conflict with a decision of the Federal Circuit applying the statute of limitations for written contracts when the acts of malfeasance is based on a written legal representation agreement.

In addition, Petitioner has cited decisions of courts of last resort of the states of Arizona, Arkansas, Florida, and Texas, which also apply the tolling rule.

The split between the decision of the Sixth Circuit and the above cited Circuits invokes Rule 10(a) of the Supreme Court Rules providing as reason to grant a writ in pertinent part:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

The issue is especially important because in *Pioneer Inv. Servs. v. Brunswick Assocs.* 507 U.S. 380 this Court approved that courts transfer to clients acts and omissions of their attorneys, but gave no guidelines whether *Pioneer* influences the application of state limitation periods. As a result the state courts across the country developed an array of different methods for the application of the *Pioneer* ruling (Pet. p.12 – p.21).

Pioneer has not resulted in any federal or state codified law, but is a judicial decision of this Court. The broad and nationwide difference in the application of the *Pioneer* ruling calls for an exercise of this Court's supervisory power for the purpose of reaching a nationwide uniform application of this decision. Clarification of this issue will avoid needless litigations and shorten the procedure in justified ones.

The Sixth Circuit court's denial to consider Petitioner's amended complaint further invokes this Court's supervisory power to settle the question whether federal courts when ruling on motion for summary judgment under FRCP 56 should consider a properly amended complaint (FRCP 15).

The Sixth Circuit's decision to disallow Petitioner to sue the Respondent for breach of written contract based on the intermediate state court's decision in *Muir v. Hadler Real Estate Mgmt. Co.*, 446 N.E.2d 820, 822 (Ohio Ct. App. 1982) is a challenge to the contract clause, and the equal protection and due process clause of the Constitution invoking Rule 10(c) of the Supreme Court Rules stating

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be settled, by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

4. Respondent errs that the courts below properly applied Ohio law concerning the period of limitations for actions against lawyers for malpractice

The courts below (App. Brief p.29) did not determine the *external cognizable event*, and did not determine it

separately for each *particular transaction,* as applied by the highest state court in *Zimmie v. Calfee Halter & Griswold,* 538 N.E.2d 398, 402 (Ohio 1989) and by the Sixth Circuit in *FDIC v. Alexander,* 78 F.3d 1103 (1996).

In addition, the record demonstrates that there remain genuine issues of fact regarding the termination of the attorney-client relationship (App. Reply Brief p.8).

As an aside, Petitioner's two letters of January 6, 1998 which the courts below found having terminated the attorney-client relationship were requested and drafted by Respondent and do not say that the attorney-client relationship is terminated. Thus, they are ambiguous with respect to the date when the attorney-client relationship terminated (Mot. for Rehearing en banc, p. 11). In *C&L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Oklahoma,* 00-292, decided April 30, 2001, this Court held that

> "[I]n appropriate cases, this Court applies the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it".

5. Respondent errs that the Sixth Circuit's decision does not disallow breach of contract suits [by clients] against [their] attorneys

and Respondent does not cite any authority to the contrary. On the other hand, there are at least 38 cases (Westlaw©) in which the intermediate courts disallowed clients to sue their attorneys for breach of contract, e.g.: *Soler v. Evans,* No. 99AP-1020; *Endicott v. Johrendt,* No. 99AP-935; *Bauer v. Georgeff,* No. 97APE03-313; *Doolittle*

& Burroughs, No. 97APE09-1262; *Thatcher v. Grubler*, No. 97APE05-733; *Harris, McClellan, Binau & Cox v. Elkins*, No. 96APE12-1634.

In fact, the Sixth Circuit did disallow petitioner's claims *for breach of a [written] contract, breach of fiduciary duty, and fraud* based on the *Muir* ruling that

> "[I]t makes no difference whether the professional misconduct is founded in tort or contract, it still constitutes malpractice. Accordingly, the one year malpractice statute of limitations set forth in R.C. 2305.11 is applicable." *Id.* at 822.

Relying on *Muir* the Sixth Circuit court reduced all Petitioner's causes of action in a single one regardless of their different applicable statute of limitations and regardless of the state statute providing in

> R.C. 2305.012:
> A cause of action shall be considered to accrue for all purposes as terminated by the statute of limitation that applies to that cause of action.

The Sixth Circuit court also disregarded the Federal Rule of Civil Procedure[4] providing in

> Rule 18(a) Joinder of Claims:
> A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, or maritime, as the party has against an opposing party.

[4] Equivalent to Rule 18 Ohio Rule of Civil Procedure

Ohio strictly separates contract actions from tort actions. *Tort* is defined as

> "private *noncontract* civil action by which the injured party may seek redress for his or her injuries. Such actions are commonly referred to as torts." See, e.g. 2315.21(4); see, also, *Haag v. Cuyahoga Cty* (N.D Ohio 1985), 619 F.Supp. 262, 276-277.

The *Muir* decision does not only invoke the contract clause, the equal protection and due process clause of the United States Constitution, but seems to be also in conflict with the right-to-remedy and open-courts provision of the Constitution of the state of Ohio.

In addition, the Sixth Circuit's adoption of the *Muir* decision is also questionable under the substantial overbreath rule contained in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

The *Muir* ruling does not only inflicts the Ohians, but was also imported by the Idaho Supreme Court in *Griggs v. Nash*, 775 P2d 120, 124 (1989).

6. Respondent errs in contending that the courts below did not fail to consider Petitioner's amended complaint or her opposing affidavits

Comparing in verbatim the district court's citation of § 8 and §10 of the complaint with § 8 and § 10 of the amended complaint, Petitioner demonstrated on appeal (App. Brief p.10 - p.12) that only the original complaint was before the court and that it did not consider the amended complaint.

On appeal Respondent admitted that the district court's findings were "consistent with the affidavit of Frank J. Cumberland" (Respondent's App. Reply Brief, P. 13). Petitioner had contradicted all statements in Cumberland's affidavit in her opposing affidavit and demonstrated with supporting letters and invoices that Respondent continued to give Petitioner legal advice through January 8, 1998 and resumed Petitioner's external representation through January 14, 1998 and continued to charge Petitioner for this through January 14, 1998 (Pet. Appendix F, p.225a; App. Brief p. 4; Joint App. p.382 - p.390, p.60 - p.461; R. 39 and R. 40, Opposing Affidavits; Joint App. p.436 - p.437, Invoice for January 1998).

The amended complaint contains particular dates and occasions when the breach of the contract occurred. As the dismissal of the case was based exclusively on limitation grounds, the courts' error to receive the amended complaint had a decisive bearing on the courts' decisions.

CONCLUSION

This case presents serious federal and constitutional questions with regard to the rights clients have against a law firm. Petitioner respectfully requests this Court grant certiorari to review them.

Respectfully submitted,

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[5] Endnote

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[5] 1. Brief in Opp. p.6: Respondent's statement that petitioner "terminated her attorney-client relationship with Kaufman and Cumberland one year and two days" before she "filed a malpractice complaint against them" and that the "complaint was filed two days after the expiration of the Ohio statute of limitations for legal malpractice actions" remain a disputed genuine issues of fact and law incorporated in the questions presented for review.

2. Brief in Opp. p.2: Petitioner's visa did not expire on March 30, 1996 but on April 18, 1996 (Joint App. p.594, Visa; p.1028, Bill Cleveland Clinic for treatment on April 2, 1996; p.601, Boarding Pass of April 9, 1996).

3. Brief in Opp. p.5: Petitioner did pay another $10'000 for the appeal (Joint App. p.608, Check December 9, 1997).

4. Brief in Opp. p.3: Mr. Cumberland did not explain the risks of nonsuccess or financial issues. He did not argue in briefs the Hague [Service] Convention. The brief was drafted and filed by an employee with 1 year experience. The Convention does not give more time to appeal than the rules for appellate procedure, but deals only with the service of judicial and extra-judicial documents abroad (Joint App. p.673, Convention).

5. Brief in Opp. p.4: The young attorney wrongly invoked Article 16 and not the only relevant Article 10 of the Convention; a motion for reconsideration was denied because Art. 10 was not raised in the appellate brief and because the young employee did not cited any authority (Joint App. p.153; judgment page Case. 96-L-147; R. 43, Vol-1-7).

6. Brief in Opp. p.5: Petitioner engaged other counsel on January 9, 1998 for the single purpose to attend the pre-trial conference in the Cuyahoga County court scheduled for January 14, 1998 and to file a voluntary dismissal as recommend by Mr. Cumberland and to file an appearance in the Lake County court for the single purpose to receive the judgment pending in Lake County (Pet. Appendix F, p.24a - 25a).